IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

C.R. No. 5155 of 2005
Date of decision : 20.9.2006.

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Parties Name

Baldev Singh and another

..... Petitioners

vs.

Karnail Singh

.....Respondent

Coram: Hon'ble Mr. Justice S.N. Aggarwal

Present: Sh. Amit Rawal, Advocate
for the petitioners.

Sh. M.L. Saggar, Advocate
for the respondent.

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S.N. Aggarwal, J.

This judgment shall dispose of CR No.5155 of 2005 (Baldev Singh and another vs. Karnail Singh) and CR No.5156 of 2005 (Baldev Singh and another vs. Karnail Singh) as the parties in both the revision petitions are the same. Both these revisions are filed against the interim orders passed in the same civil suit. Therefore, common questions of law and facts are involved. The facts are taken from CR No. 5155 of 2005.

Lakha Singh was the common ancestor of the parties. The land owned and possessed by Lakha Singh devolved on his four sons,

namely, Sampuran Singh (father of the petitioners), Charan Singh, Chand Singh and Karnail Singh (respondent). Sampuran Singh executed the sale deed for the land measuring 16 Kanals 0 Marla comprised in Rect. No. 43 Killa No. 13 and 19 in favour of his sons Baldev Singh and Gurdeep Singh (petitioners). When they started construction, they faced resistance from Karnail Singh -respondent. On this, the petitioners filed civil suit for permanent injunction against said Karnail Singh-respondent. An application for interim stay was also filed with the prayer that Karnail Singh-respondent be stopped from interfering in the peaceful possession of the petitioners in the suit land and also from interfering in the construction being raised by the petitioners on the land in their possession. Karnail Singh-respondent filed the written reply to this application and resisted the same.

On the other hand, Karnail Singh also filed a counter claim. Alongwith counter claim, an application for interim stay was also filed by him in which it was prayed that the petitioners be restrained from raising any construction over the land in dispute, which was jointly owned by the parties. This application was opposed by the petitioners.

Learned trial Court, after considering the counter versions of both the parties dismissed the application for interim stay filed by the petitioners vide order dated 4.2.2005 by holding that the petitioners have failed to make out a prima facie case. The petitioners filed the appeal against the said order, which was also dismissed by the learned Lower Appellate Court vide order dated 10.8.2005. These orders are

the subject matter of judicial review in CR No. 5156 of 2005.

The counter application for interim injunction filed by the respondent for restraining the petitioners from raising the construction was accepted by the learned trial Court vide order dated 4.2.2005 and the petitioners were directed to maintain status quo regarding alienation, raising of construction and changing the nature of joint land or any part thereof, during the pendency of the main suit. The appeal filed against this order by the petitioners was dismissed by the learned Lower Appellate Court vide order dated 10.8.2005. Both these orders are subject matter of controversy in CR No. 5155 of 2005.

The learned counsel for the petitioners has placed reliance on the Division Bench Judgment of this Court reported as **Sant Ram Nagina Ram vs. Daya Ram Nagina Ram and others** AIR 1961 Punjab 528, Full Bench judgment of this Court reported as **Bhartu vs. Ram Sarup** 1981 P.L.J. 204 and the Division Bench judgment of this Court reported as **Bachan Singh vs. Swaran Singh** 2000 (3) Civil Court Cases 2 (P&H) in support of the proposition that even co-sharer in possession can utilize the land in a husband like manner, undisturbed by other co-sharers.

On the other hand, the learned counsel for the respondent has relied upon the single Bench judgment of this Court reported as **Ram Niwas vs. Jai Ram alias Tej Ram** 2000 (3) Civil Court Cases 379 (P&H) and the judgment of Hon'ble Supreme Court reported as **Meharwal Khewaji Trust (Regd.), Faridkot vs. Baldev Dass** (2005-1) Punjab Law Reporter 399 to support his submission that a

co-sharer in possession cannot raise construction or change the nature of the joint property.

Let us first see the facts of this case. It was pleaded in the plaint that all the four sons of Lakha Singh are in possession of their respective shares since 1972-1973 and they are cultivating the land in their respective possessions. It was further pleaded that Karnail Singh-respondent had also constructed his house in the land in his possession and the petitioners and their father have also constructed the house. Sampuran Singh (father of the petitioners) had sold the land to the petitioners vide registered sale deed dated 31.8.1995. Karnail Singh-respondent had also sold the land measuring 1 Kanal 12 Marlas vide sale deed dated 2.6.1993. Since the parties were in separate possession of their respective shares, therefore, they had the right to use the agriculture land of their share in husband like manner.

The version of Karnail Singh-respondent on the other hand was that Sampuran Singh had no right to alienate the land in favour of his own sons vide sale deed dated 31.8.1995. It was also pleaded that the sale deed dated 2.6.1993 was got executed from him through fraud and he had challenged the same by filing a civil suit. It was also pleaded by him that the suit land was joint between the parties and if the petitioners were permitted to raise construction over the suit land, he would suffer an irreparable loss. It was not denied if he has constructed his own house in the land in his possession and the petitioners and their father Sampuran Singh have constructed a house in the land in their possession.

At the time of arguments, the learned counsel for the

petitioners submitted that Lakha Singh had suffered a collusive decree in favour of his four sons, by which the agriculture land came to be owned and possessed by the four sons of Lakha Singh including Sampuran Singh (father of the petitioners) and Karnail Singh (respondent). Since then they are coming in separate possession of the land to the extent of their share. Jamabandi was also produced to show that although the land is shown to be jointly owned by the four brothers, but they are shown to be in separate possession of specific khasara numbers. Site plans, Annexures P-1 to P-3 were also placed on the file. Annexure P-1 reveals that Charan Singh-brother of the respondent has constructed his house and Sampuran Singh has also built his house. Site plan Annexure P-2 reveals the land which is in possession of Karnail Singh-respondent and the land which is in possession of Chand Singh, while Annexure P-3 reveals the land which is in cultivating possession of Charan Singh.

All these documents prima facie prove that the land may be jointly owned by Sampuran Singh (father of the petitioners), Karnail Singh (respondent) and their two brothers, namely, Charan Singh and Chand Singh, but each one of them is in possession of separate portion.

There is no complaint, if one brother is in possession in excess of his share or if the other was in possession of the agriculture land which was less than his share.

Sampuran Singh has sold his land to his sons, who are the petitioners, vide sale deed dated 31.8.1995. That sale deed has not been challenged by Karnail Singh-respondent till today by filing a

separate suit. Similarly, Karnail Singh-respondent has sold the agriculture land measuring 1 Kanal 12 Marlas vide sale deed dated 2.6.1993. It may be that the said sale deed was the result of fraud or that the said sale deed has been challenged by Karnail Singh-respondent but the fact remains that the sale deed has been executed by him. These facts also clearly reveal that Sampuran Singh and Karnail Singh and their two brothers are dealing with the property in their possession as owners.

Not only this, it is further proved that Sampuran Singh has constructed his house in the agriculture land in his possession. Karnail Singh-respondent has constructed his house over the land comprised in Rect. No. 37 Killa No. 16 and 24, while the suit plan Annexure P-1 also reveals that Charan Singh has also constructed his kothi in the agriculture land which came to his share and which is in his possession. This fact also reveals that they are dealing with the property as owners and none has objected to each other in raising construction of the house in the agriculture land in their respective possessions.

It was only when the petitioners started raising construction of a petrol pump in the agriculture land measuring 16 Kanals purchased by them from their father Sampuran Singh vide registered sale deed dated 31.8.1995, that Karnail Singh -respondent started raising objection to it. Therefore, the question to be answered by this Court in this judgment, is whether Karnail Singh-respondent has any right to stop the petitioners from raising construction in the agriculture land in their possession even if he was a co-sharer.

Similar question had come up before the Hon'ble Division Bench in **Sant Ram Nagina Ram's case (**supra) which is reproduced as under :-

> "If, in spite of protest by one co-owner, another co-owner raises a building on a portion of joint land, not exceeding his own share therein can the aggrieved co-owner obtain a decree for demolition of that building without proving special damage or substantial injury to him?"

Their Lordships of the Hon'ble Division Bench discussed the whole law and in para 78 of the judgment laid down the following principles :-

> "(78) The weight of the authorities and the principles which have been discussed above, give rise to the following propositions-
>
> (1)A co-owner has an interest in the whole property and also in every parcel of it.
>
> (2)Possession of the joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.
>
> (3)A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.
>
> (4)The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not

only be exclusive but also hostile to the knowledge of the other, as , when a co-owner openly asserts his own title and denies that of the other.

(5)Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

(6)Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

(7)Where a co-owner is in possession of separate parcels under an arrangement consented to by the other co-owners, it is not open to anyone to disturb the arrangement without the consent of others except by filing a suit for partition.

(8)The remedy of a co-owner not in possession, or not in possession of a share of the joint property, is by way of a suit for partition or for actual joint possession, but not for ejectment. Same is the case where a co-owner sets up an exclusive title in himself.

(9)Where a portion of the joint property is, by common consent of co-owners, reserved for a particular common purpose, it cannot be diverted to an inconsistent user by a co-owner; if he does so, he is liable to be ejected and the particular parcel will be liable to be restored to its original condition. It is not necessary in such a case to show that special damage has been suffered."

These principles of law were approved by the Hon'ble Full

Bench of this Court in **Bhartu's case** (supra), although the question of alienation by a co-owner was the subject matter of decision before the Hon'ble Full Bench, which was a collateral but connected issue. The Hon'ble Full Bench in **Bhartu's case** (supra) held that property even if sold by a co-sharer by specific khasra numbers and even if possession of a specific piece of land is given, it would be subject to adjustment at the time of partition.

However, the proposition of law before the Hon'ble Division Bench of this Court in **Bachan Singh's case** (supra) was also the same, which is to be answered in the present case. The question in the words of their Lordships was as under :-

> "The controversy for our consideration is whether a co-owner of the property is entitled to seek an injunction against other co-owner who has been in exclusive possession of the entire or part of the property restraining him from making any construction in that part of the property."

Their Lordships of the Hon'ble Division Bench in **Bachan Singh's case** (supra) also discussed the law in detail. The judgment in **Sant Ram Nagina Ram's case (**supra) and **Bhartu's case** (supra) were also discussed. Some Single Bench judgments of this court which laid down the law to the contrary were overruled and some judgments which followed these judgments, were approved. Their Lordships also laid down the following principles of law applicable in such cases :-

> "15. On a consideration of the judicial pronouncements on

the subject, we are of the opinion that :

(i) a co-owner who is not in possession of any part of the property is not entitled to seek an injunction against another co-owner who has been in exclusive possession of the common property unless any act of the person in possession of the property amounts to ouster, prejudicial or adverse to the interest of co-owner out of possession.

(ii) Mere making of construction or improvement of, in, the common property does not amount to ouster.

(iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property.

(iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such act which is detrimental to his interest.

In all other cases, the remedy of the co-owner out of possession of the property is to seek partition, but not an injunction restraining the co-owner in possession from doing any act in exercise of his right to every inch of it which he is doing as co-owner."

In the present case, admittedly, Karnail Singh is in possession of a piece of land of his share, while Sampuran Singh (father of the petitioners) is in possession of the land of his share and

out the land of his share, he has transferred a part of that land in favour of his sons vide sale deed dated 31.8.1995, which is in their possession. The four brothers may be the joint owners, but they are in separate possession and therefore, each co-sharer has a right to put the land to best use, which does not diminishes the value and utility of the property. The 6th and 7th principles laid down in **Sant Ram Nagina Ram's case (**supra) are applicable to the facts of this case i.e. that the petitioners have a right to use the property in a husband like manner but they should not object to the similar use of land by Karnail Singh-respondent which is in his possession. Sampuran Simgh has constructed his house in the land in his possession while Karnail Singh has constructed his house in the land in his possession. No dispute. Sampuran Singh sold a part of his land to his own sons, Karnail Singh also sold a part of his land. No dispute. Therefore, the co-sharers are using the land in husband like manner already. The 7th principle of the said judgment also says that when co-sharers are in possession of separate piece of land under a consented arrangement, they can disturb the same only by filing partition proceedings not otherwise.

Even in **Bachan Singh's case** (supra) the Hon'ble Division Bench held that mere construction or improvement does not amount to ouster. The co-owner can seek injunction only if the act of co-owner in possession diminishes the value or utility of the land or if such act is detrimental to the interest of the co-owner not in possession, or if it causes special damage to him.

Karnail Singh-respondent has not made out any case to show

if the proposed construction by the petitioners would be detrimental to his interest or it would cause special damage to him or if it amounts to ouster. After all it would be subject to adjustment at the time of partition.

This Court does not find any reason how a co-sharer in possession of the agriculture land of his own share can seek stay order against another co-sharer in possession of agriculture land of his share seeking to restrain him from using the land in a particular manner particularly when he is using the land in his possession in a husband like manner.

It was held by this Court in the judgment reported as **Maman Chand vs. Kamla** 1996 (1) Recent Revenue Reports 230 that a co-sharer cannot be restrained at the instance of other co-sharer from enjoying property in his possession. If the co-sharer is restrained from raising construction, it would result in an irreparable loss to him and it would be an abuse of process of Court. The same view of law was followed by this Court in the judgment reported as **Tarsem Singh vs. Parkash Kaur** 2002 (1) Civil Court Cases 659 (P&H). Similar view of law was taken by this Court in the judgment reported as **Mukhtiar Singh vs. Tara Singh and others** 2001 (1) Civil Court Cases 357 (P&H) and it was observed that a co-owner in exclusive possession of the property can raise construction and enjoy the property and if he raises any construction thereon, it does not amount to ouster, although the construction would be subject to the final partition. These judgments are in consonance with the judgments of the Hon'ble Division Bench of this Court in **Sant Ram Nagina**

Ram's case (supra) as well as in **Bachan Singh's case** (supra) and therefore, would be applicable to the facts of the present case.

Therefore, as laid down in the **Sant Ram Nagina Ram's case (**supra) when the parties are in settled possession with mutual consent that arrangement can be disturbed only be seeking partition proceedings.

In the present case, it was also brought to the notice of this Court by the learned counsel for the petitioners, Karnail Singh-respondent had started partition proceedings under Section 111 of the Punjab Land Revenue Act. Learned Assistant Collector Ist Grade vide order dated 24.8.2004 had decided the mode of partition. However, Karnail Singh-respondent filed an appeal against the said order before the Collector-cum-SDM (East) Ludhiana, who vide order dated 7.1.2005 dismissed the appeal. Karnail Singh-respondent filed the revision petition before the Divisional Commissioner, Patiala, but the said revision petition was also dismissed by the Divisional Commissioner, Patiala vide order dated 13.3.2006. Thereafter, Karnail Singh-respondent filed an application before the Assistant Collector 2nd Grade, Ludhiana on 31.8.2006 with the prayer that the partition petition may be disposed of by the revenue Court for want of jurisdiction.

This conduct of Karnail Singh-respondent clearly reveals that he has withdrawn the partition proceedings after initiating the same. It means, therefore, that he does not seek any partition. In other words, it reveals that prima facie the partition had already taken place between the parties. If it had not been so, Karnail Singh-respondent

would not have withdrawn the partition proceedings initiated by him. Therefore, this conduct of Karnail Singh-respondent demolishes his story that the land was jointly owned by him and his brothers.

Now, the judgments relied upon by the learned counsel for the respondent-Karnail Singh may also be discussed.

So far as the judgment in **Ram Niwas's case** (supra) is concerned, it is a Single Bench judgment of this Court and therefore, cannot be followed when there are Division Bench judgments to the contrary. Moreover, the facts in **Ram Niwas's case** (supra) were entirely different as was observed towards the end of paragraph 17 of the judgment as under :-

> "The Hon'ble Division Bench also gave the right to a co-owner to come to the Court and get a relief if the acts of other co-owner are detrimental to the interest of one co-owner. So, it can be said that every case has to be viewed on its own angle. In the present case the defendants prima facie committed those acts which are definitely detrimental to the interest of the plaintiff."

In the present case, the petitioners are merely raising the construction. It is not shown as to how the raising of construction on a piece of land, which is in possession of the petitioners, would be detrimental to the interest of the other co-owners. Therefore, the judgment in **Ram Niwas's case** (supra) would not be applicable to the facts of this case.

So far as the facts in **Meharwal Khewaji Trust (Regd.), Faridkot's case** (supra), is concerned, it was not a case of co-sharers.

It was an injunction application in a suit for possession of the scheduled property. In such circumstances the Hon'ble Supreme Court was pleased to restrain the respondent from raising any construction. Different principle of law would apply to a tenant in possession, different principle of law would apply to a trespasser in possession or a licencee in possession and different principles of law would apply to a co-sharer in possession. Therefore, the judgment of the Hon'ble Supreme Court in **Meharwal Khewaji Trust (Regd.), Faridkot's case** (supra) will not apply to the facts of this case.

Keeping in view the discussion held above, this petition is accepted and the orders passed by the Courts below are set aside. It is held that prima facie the petitioners are entitled to raise construction on the agriculture land in their possession but it would be subject to the passing of the final judgment in the main suit.

However, nothing said in this order shall affect the merits of the case.

(S.N.Aggarwal)
Judge

September 20, 2006.
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